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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

REPLY BRIEF

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Petitioner submits this Reply Brief in response to the brief of respondents in this action and in response to contentions bearing on this case advanced by the government in *Chandler* v. *Roudebush*, No. 74-1599.

ARGUMENT

I.

Section 717 Did Not Repeal Pre-Existing Statutory Remedies.

The government suggests at the outset that in deciding whether section 717 repealed all, or most, pre-existing statutory remedies, the Court neither decide nor consider what those remedies might be or whether they exist at all. Brief for Respondents, p. 35, n.18. ("R.Br."). Such an approach would require the Court to construe section 717

without taking into account the nature of the independent judicial remedies which might be abolished or preserved by its decision. Petitioner believes it would be inappropriate for the Court to deliberately close its eyes to the consequences of its decision. Whether federal employees had a judicial remedy prior to 1972 is fairly comprised within the question presented as articulated in the petition for writ of certiorari; the question of whether section 717 repealed *pro tanto* the 1866 Civil Rights Act, etc., can only be answered in the affirmative if federal employees previously enjoyed rights under those acts.

It would be inappropriate to delay further a decision as to whether petitioner is entitled to a trial on the merits of his claims. If this Court remands the case to the Second Circuit and it rules that petitioner cannot sue under the pre-1972 statutes, certiorari will again be necessary because the circuits[1] will be divided on the question. Such a remand will postpone for yet another two years the decision in this case, which arises out of events in 1971 and which was delayed by the government's inexcused failure to promptly process petitioner's administrative complaint.

The government, it should be noted, does not squarely assert that federal employees had no right to sue prior to 1972. On the contrary, the Solicitor General apparently feels constrained not to advance such a contention in light of past representations made by the government to Congress and this Court. In 1970 the Department of Justice advised Congress that the federal courts already had jurisdiction over claims that federal officials had acted in violation of the law or constitution. In 1971 the Civil Service

[1] See *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1974); *Petterway* v. *Veterans Administration Hospital*, 495 F.2d 1223 (5th Cir. 1974).

Commission advised Congress that federal employees aggrieved by employment discrimination had a right to sue under statutes then in existence.[2] In opposing certiorari in *Gnotta* v. *United States*, 397 U.S. 934 (1970), the Solicitor General maintained that sovereign immunity did *not* bar Mr. Gnotta from suing for injunctive relief if he had been denied a promotion because of his national origin. The government contended that the complaint in *Gnotta* was defective solely because Gnotta had named the wrong federal defendants, and that he was free to commence a new action against the right ones.[3] In view of the Solicitor General's position in *Gnotta* v. *United States*, and of the Civil Service Commission's assertion to Congress that it was incorrectly decided, it is not surprising that the government does not here rely on the court of appeals decision in this case. Nor does the government contend, as it did in *Gnotta*, that petitioner sued the wrong federal officials.[4]

[2] Brief for Petitioner, pp. 11-13.

[3] "The proper parties defendant in this case, for the purposes of mandatory relief, were the individual Civil Service Commissioners, who could have been sued in their official capacity in the district court under 28 U.S.C. 1391(e). Nothing in the decision of the court of appeals would prevent petitioner now from suing the Commissioners in the district court under 28 U.S.C. §1391(e)." Memorandum For The Respondents In Opposition, *Gnotta* v. *United States*, No. 928, October Term, 1969, pp. 2-3. The Solicitor General declined to take a position as to whether *Gnotta* could sue for back pay. *Id.*, p. 3. In *United States* v. *Testan*, No. 74-753, the government appears to adhere to this position that sovereign immunity provides no protection for federal officials who act "in a manner inconsistent with a specific constitutional prohibition or beyond their statutory powers." Reply Brief for United States, p. 10.

[4] In *Salone* v. *United States*, No. 74-1600, the United States moved to dismiss the complaint for failure to join the Secretary of the Air Force, on the ground that he was an indispensable

The government maintains that section 717 must be construed to have repealed all pre-existing remedies unless it is clear that Congress intended not to do so. R. Br. 19, 26. At least since *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842), the law has been exactly the opposite; such an implied repeal can be found only in the face of "a clearly expressed congressional intent" to void the earlier law. *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). That principle is equally applicable where the asserted repeal is based on the fact that the two laws provide remedies for the same misconduct. "The more natural, if not the necessary inference in all such cases is, that the Legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each." *Wood* v. *United States*, 41 U.S. (16 Pet.) at 363. In *United States* v. *Borden Co.*, 308 U.S. 188 (1939), expressly relied on by this Court in *Morton* v. *Mancari*, 417 U.S. at 551, the Court stressed that to establish a repeal "[i]t is not sufficient . . . to establish that subsequent laws cover some or even all of the cases provided for by [the prior Act]; for they may

party, and later moved to dismiss on the ground that the Secretary, who had been so joined, was not a proper party at all. Petition for Writ of Certiorari, No. 74-1600, p. 7, N.13. Petitioner maintains that, except to the extent that a complainant seeks to establish personal monetary liability on the part of a defendant, all such government motions are frivolous. Regardless of which government official is the nominal defendant, all papers are served on the same government attorneys and the same attorneys defend the suit. Compare Rule 25(d), Federal Rules of Civil Procedure. With the exception noted, motions to dismiss, grounded on the contention that plaintiff has not named the correct federal defendant, rests on a distinction of no practical significance, serve only to delay resolution of the merits of the case, and should not be entertained by the lower courts. Compare *United States* v. *Mississippi*, 380 U.S. 128 (1965).

be merely affirmative, or cumulative, or auxiliary." 308 U.S. at 198-199.

The government properly notes that the adoption of Title VII of the 1964 Civil Rights Act did not repeal the pre-existing rights of private employees. R. Br. 20-21, 25. Most of the contentions advanced by the government for its claim that section 717 repealed the rights of federal employees are in no way distinguishable from the facts applicable to private employees. The government stresses that Congress in 1972, when it adopted §717, was at best uncertain whether federal employees had any other judicial remedies, and therefore could not have intended to preserve those remedies; but in 1964, when it adopted Title VII, Congress was even more convinced that private employees had no such remedies.[5] Petitioner maintains that, as the government contended in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969), the understanding of Congress as to whether there was a pre-existing statute is largely irrelevant.[6]

Section 1981 would, of course, give a cause of action to an employee who failed to sue within the time provided by section 717, but it also does so for private employees who do not act within the period set by section 706; the mere existence of such time limits does not warrant an inference that Congress attached such immense importance thereto

[5] Congressman Rodino remarked, "Up to this moment the Congress of the United States . . . has failed to act against discrimination in employment." 110 Cong. Rec. 1539. Congressman Ryan described Title VII as "an important first step in an area where the federal government previously has refused to intervene." 110 Cong. Rec. 1643. See also 110 Cong. Rec. 1540, 1592-95, 1599-1602, 1626-31, 1638-39, 1645, 2601-02, 7207, 7218, 7242, 7712.

[6] Brief for the United States as Amicus Curiae, No. 33, October Term, 1969, pp. 29, 31, n.14.

as to want to repeal all other statutes.[7] Although the government characterizes section 717 as creating a "comprehensive system" of judicial remedy, that section itself contains only two sentences with regard to judicial relief; the details of that procedure are incorporated by reference to the provisions of Title VII applicable to private employees. See section 717(c) and (d). The delineation of the substantive conduct forbidden to private employers by sections 703 and 704 is far more elaborate than the prohibition in section 717(a). Section 717(b) merely directs the Civil Service Commission to establish an effective procedure for handling complaints of employment discrimination; sections 705-714 specify in far greater detail the procedures to be followed by the EEOC in processing such complaints by private employees.

The government acknowledges that Congress expressly rejected a proposed amendment to section 706(f) to make Title VII an exclusive remedy, but contends this amendment would not have applied to federal employees since the United States is not an employer within the meaningful section 701(b). But section 717(d) expressly makes ap-

[7] Title II of the 1964 Civil Rights Act does not authorize monetary relief, and is in this regard narrower than the 1866 Civil Rights Act. The government, in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969), expressly rejected the contention that this difference compelled the conclusion that Title II had repealed the earlier act *sub silentio*. "It may be objected that our conclusion is sound only insofar as it focuses on those provisions of Title II which *add* substantive guarantees or remedial machinery and ignores the fact that the new law in some respects *retrenches* on the broad coverage of the 1866 Act. The answer is that, confronted with the same situation with respect to the 1968 housing law, the Court in *Jones* [v. *Alfred A. Mayer Co.*, 392 U.S. 409 (1968)] did not on that account find a *pro tanto* repeal; the same result is compelled here." Brief for the United States as Amicus Curiae, No. 33, October Term, 1969, p. 31.

706(f) through (k).[8] In support of its contention that section 717 was intended to be an exclusive remedy the government quotes the House and Senate reports to describe section 717 as "providing *the* statutory basis for . . . appeal or court access . . ." R. Br. 25 (Italics added by government.) The full quotation, however, has precisely the opposite meaning:

> Each agency of the Federal Government would be responsible for establishing an internal grievance procedure and programs to train personnel so as to enable them to advance under the supervision of the Civil Service Commission. If final action had been taken by an agency or the Civil Service Commission, an aggrieved party could bring a civil action under the provisions of section 706. The House bill did not cover Federal employees. The House receded. In providing the statutory basis for *such* appeal or court access, it is not the intent of the Committee to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under, statute for national security reasons in the interests of the United States. (Emphasis added)[9]

The word "such", omitted from the government's brief, clearly refers to the civil action under section 706 men-

[8] The government appears to want the Court to apply to it from 706(f)-(k) only those provisions limiting the rights of employees. Thus, the government asserts that the two-year limitation on back pay in section 706(a) should apply to it, Memorandum For Respondents In Opposition, *Place* v. *Weinberger*, No. 74-116, p. 3, although that limit refers to the filing of a charge with the EEOC, but that, insofar as section 706 contemplates a trial *de novo*, that it should be held inapplicable.

[9] H. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 21 (1972), Legislative History 1841; S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess., 21 (1972), Legislative History 1819.

tioned two lines earlier. Section 717 is thus described, not as "the" basis for all federal employment suits, but as the basis for such suits under the procedures of section 706.

Throughout the lengthy legislative history of the 1972 Act, with the exception of the unsuccessful Senate amendment, not a single Senator, Congressman, Report or witness urged repeal of any pre-existing remedy, and none ever stated that section 717 was intended to be an exclusive remedy, that cutting off all remedies from federal employees who did not sue within 30 days was an important congressional policy, or that restricting judicial remedies would somehow improve the administrative process. From the bare bones of section 717 the government contends that this was the secret intent of Congress,[10] and that what Congress did say, that federal employees were to have the same rights and remedies as private employees,[11] was precisely the opposite of what it meant. On this foundation the government would have this Court conclude that Congress intended to repeal, in whole or part, the 1866 Civil Rights Act, the Mandamus Act, the Tucker Act, the Administrative Procedure Act, and 28 U.S.C. §1331. The government invites the Court to construe section 717, not as expanding the rights of federal employees, but as the most sweeping repeal of anti-discrimination remedies since the end of Reconstruction. The invitation should be declined.

The government essentially concedes that, to the extent that petitioner seeks forms of relief not available under Title VII, he still has a remedy under the pre-1972 statutes. R. Br. 34, n.17. The government notes that among those unavailable remedies is damages against the allegedly discriminatory officials in their individual capacities. The com-

[10] R.Br. 18, 19, 21, 26, 31, 32, 33.

[11] Brief for Petitioner ("P.Br."), 11-13.

plaint in this action names as defendants those officials, and asks the court for "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay." A 14a. The prayer asks for literally any relief whatever which may be appropriate; the enumeration is clearly not intended to be exclusive. The request for damages is broad enough to encompass both compensatory and punitive damages as against both the government and the defendant individuals. Even if the form of the prayer were far more restricted, that request does not ordinarily limit the relief which can be granted. Thus even on the government's view, petitioner's right to maintain this action was not fully withdrawn by Title VII.[12]

II.

Petitioner Should Not Be Required to Further Exhaust Administrative Remedies.

Petitioner maintains, for the reasons set out in his brief,[13] that it would be inappropriate to establish an exhaustion requirement for federal employees who wish to sue under statutes other than section 717. In the instant case, however, petitioner did in fact consume almost two years in the administrative process prior to filing suit. Petitioner maintains that he cannot be required to do more.

[12] The government notes that the court of appeals opinion does not expressly consider this problem; the failure of the court of appeals to discuss this problem in its opinion cannot render unreviewable an otherwise defective decision. The question of whether Title VII repealed the right of federal employees to sue individual supervisors for damages under the 1866 Civil Rights Act, etc., is clearly "fairly comprised" within the question of whether Title VII repealed *all* rights of federal employees to sue under those statutes. R.Br. 34, n.18.

[13] P.Br. 45-60.

In its brief in *Chandler* v. *Roudebush*, No. 74-1599, the government states with regard to the administrative process for handling complaints of employment discrimination, *"The employee's only burden is to file an administrative complaint and to furnish any information available to him."*[14] Petitioner maintains that that is all the government can reasonably ask by way of exhaustion. As a practical matter virtually all the relevant evidence is in the hands of, or under the control of, the government itself; the employment records are official documents and almost all witnesses are federal employees.[15] So long as an employee has notified the government of his grievance and answered any inquiries for additional information, he has given the government precisely what it asks for in this case—"an opportunity to correct its own errors." R. Br. 42.

Both petitioner in this case, and the petitioners in *Penn* v. *Schlesinger*, No. 74-476, gave the government such notice. Indeed, as a result of the subsequent litigation, the facts of these cases are by now known to most attorneys and officials responsible for federal employment discrimination litigation in the Civil Service Commission and the Department of Justice. No claim is made that these petitioners have withheld relevant information requested by the government. On the contrary, Brown fully cooperated in the investigation of his case and the government has never sought any information whatever from the petitioners in *Penn*.

The problem arises because the regulations require an employee to do far more. Section 717(b) contemplates that, once the government learns of a complaint, there will be a thorough investigation, and resolution on the merits,

[14] Brief for the Respondents, No. 74-1599, p. 63, n.37 ("C.R.Br.").

[15] Where they are not, of course, the employee is powerless to compel their attendance.

of any instance of possible discrimination, and that the investigation will not end until the Commission either concludes there is no discrimination or finds that there is and orders unappropriate remedy. But under part 713 even after an affected employee has brought the discrimination to the attention of his superiors, the employees must come forward at least 5 more times[16] and affirmatively demand further processing. If at any point he fails to do so the regulations excuse, and may even forbid, the responsible officials from completing an inquiry as to whether section 717 (a) has been violated. Because of this system, out of approximately 30,000 complaints of discrimination made each year to Federal EEO counsellors, only a few hundred are completely processed through a final decision on the merits.[17]

Petitioners maintain that to the extent that exhaustion is required, the government is entitled only to notice of the charge of discrimination and disclosure, on request, of information in the employees. Under the present system less than 2% of the federal employees who complain of dis-

[16] (1) After notifying the EEO counsellor the employee must indicate he is dissatisfied by any counseling received in order to obtain a "right to complain" letter. §713.213(a). (2) After receipt of that letter the employee must, within 15 days, file a written complaint. (3) After the investigation, the employee must indicate he is not "satisfied" with any adjustment the agency has proposed. §713.217(a). (4) If he does so he must, within 15 days of an appropriate notice, indicate he wants a hearing. §713.217(b). (5) After the agency makes its decision the employee must, within 15 days, indicate he wants the Appeal Review Board to consider the matter. §713.233(a).

[17] In petitioner's case the government knows of Brown's grievance, but objects that it is "unable" to do anything about it because §713.233 forbids the Appeals Review Board to act if there is no notice of appeal within 15 days of Final agency action. In *Penn* the government objects that it is "unable" to do anything because §713.213-14 forbids any agency to even begin action on a well-known complaint except where six conditions are met.

crimination obstinately reassert their claims the five times necessary to assure processing through the Appeals Review Board.[18] At that rate adoption of the exhaustion rule sought by the government would render section 1981, etc., unavailable to the vast majority of federal employees; if, as a result of that rule, all federal employees who complained to EEO counsellors processed their grievances through the Appeals Review Board in order to be able to sue under section 1981, the number of hearings would increase by a factor of 10, the number of appeals by a factor of 50. Under the former circumstance the government's exhaustion rule would sanction a pattern of official refusal to look into most allegations of discrimination; under the latter it would so flood the system with complaints as to grind it to a halt—in neither would that rule, as the government implies, encourage reform of the system. R. Br. 54. If, after giving the government fair notice, the employee commences a lawsuit, that action in no way "aborts" the administrative proceeding. See R. Br. 32, 33. Nothing in the regulations permits an agency or the Commission to discontinue processing an administrative complaint because of pending litigation, and it is not the government's practice to do so. See *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C.Cir. 1975); 5 C.F.R. § 713.283.

The government urges that section 717 reflects an important congressional policy that the Civil Service Commission, rather than the courts, should be "the foundation" of enforcing that ban on discrimination,[19] that Congress determined "to maintain the Commission as the expert

[18] Of approximately 30,000 such charges in the last Fiscal year, the Appeals Review Board finally resolved only 570 on the merits. R. Br. 53a.

[19] R. Br. 46.

agency in such matters," [20] and that Congress intended to require federal employees to pursue all administrative procedures as a precondition of suit because it thought that this would lead to "the development of effective administrative remedies".[21] Nowhere in the legislative history of section 717, however, did any member of congress announce or intimate any such policy. The statements that are made were directly to the contrary—that the Commission had no expertise, that existing exhaustion requirements, if any, should be drastically reduced, and that the Commission's enforcement activities had been so ineffective as to require a judicial remedy.[22] The stated reason for leaving administrative jurisdiction in the hands of the Civil Service Commission was not that Congress thought the Commission competent or likely to become so, but solely because EEOC had too great a backlog to handle those additional responsibilities.[23]

The distinction between the limited exhaustion requirement suggested by the government in *Chandler*, and the more drastic requirement urged in this case, is well illustrated by the difference between *McGee* v. *United States*, 402 U.S. 479 (1971) and *McKart* v. *United States*, 393 U.S. 185 (1969). In *McGee*, a prosecution for failure to submit to induction, the defendant maintained that his I-A classification was improper, and that he should have been classified as a ministerial student. McGee "had never requested that classification nor had he submitted information which would have been pertinent to such a claim." 402 U.S. at 486. This Court concluded that McGee had attempted "to sidestep the administrative process and make the first

[20] R. Br. 46.

[21] R. Br. 73.

[22] P. Br. 49, 50, 51.

[23] P. Br. 39, n.72.

serious case for an exemption". 402 U.S. at 487. On these facts the Court concluded that McGee had failed to present his exemption claim to his draft board and so could not do so in Court. In *McKart*, also a draft prosecution, the defendant had in fact sought a IV-A exemption and had provided his board with all necessary factual information in his possession. McKart, however, had not appealed the denial of that exemption to the appeal board, which would have considered such an appeal *de novo*, and had not submitted to a preinduction physical which, if failed, would have barred induction and obviated the need for judicial review of his exemption claim. This Court, however, held McKart had fairly notified his board of his exemption claim and could therefore litigate his classification in court, even though there were other steps he could have taken that might have prevented his induction order. 395 U.S. at 197-203.

Any requirement of further exhaustion would be particularly unwarranted on the facts of this case. When petitioner first filed his administrative complaint, the applicable regulations required the agency to render a decision within 60 days. R. Br. 55. In fact, however, the agency did not decide the case for 617 days. P. Br. 63. The government now contends that he waived his right to invoke this delay to avoid further exhaustion by failing to exhaust his administrative remedies against administrative delay by complaining to the Civil Service Commission. R. Br. 56. The government does not, however, contend such a complaint to the Commission would have been fruitful; on the contrary, even though the deadline is 180 days, a majority of all administrative proceedings take longer than that.[24] Only last year the Chairman of the Civil Service Commission testified that, although it had the power to act if the

[24] See p. 18, infra.

180-day rule were violated, "[Q]uite frankly, we don't have the resources to do this".[25]

It is manifestly unfair to impose on petitioner exhaustion rules thought up by the government literally years after this suit was commenced. The notice which petitioner received from the government in March, 1973, in no way intimated that he was obliged to file any further administrative appeal in order to perfect or protect his right to sue. A. 45a. Throughout the proceedings in the district court, and the appellate briefs, petitioner expressly assumed and asserted, and the government did not deny, that petitioner had adequately exhausted his administrative remedies by obtaining a final agency decision. In June, 1974, 13 months after the action was filed, the government at oral argument in the court of appeals advanced its first exhaustion standard, that an employee must also obtain a decision by the Appeals Review Board. In March, 1975, 22 months after the action was filed, the government in opposing certiorari suggested a second exhaustion standard, that an employee could sue after final agency action provided he did so within 30 days. Brief For the Respondents In Opposition, pp. 6-7. In October 1975, 29 months after the action was commenced, the government advanced its third exhaustion standard, that an employee who had experienced unreasonable delay could sue after final agency action provided he had complained about the delay to the Commission. R. Br. 55-56. Petitioners maintain that each of these standards is incorrect; equally important, there was no way he could have known in 1973 which of these

[25] Oversight Hearings Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess., p. 172. On November 26, 1975, petitioners asked the government to disclose the number of cases, if any, in which it had acted to remedy such agency delay. Pp. 19aa-20aa. On February 13, 1976, the government declined to disclose this number. P. 27aa.

was the correct rule or which might years later be advocated by the government. The government contends the regulations "leave little room for doubt concerning 'the "correct" way to exhaust' ". R. Br. 53. But none of the three rules advanced by the government can be found anywhere in the regulations; it would be unconscionable to penalize a GS-7 clerk with a high school education because, in a brief period in 1973, he was unable to foresee the exhaustion rules that the best attorneys in the Civil Division and the office of the Solicitor General would not "discover" for several years thereafter.

The government concedes that, in cases such as petitioner's where the agency has found no discrimination, the Appeals Review Board overturns that finding in only 1 case out of 50. R. Br. It appears that, among cases in which discrimination is found, back pay is awarded in perhaps 1 case out of 4.[26] Thus, out of every 200 appeals taken in cases such as petitioner's, only 1 employee would receive any back pay as a result. The efficient administration of justice does not require that 199 employees pursue such an unsuccessful appeal merely to relieve the courts of handling a single back pay claim. Even if petitioner had the good fortune to be that lucky employee, he still would have had to sue to get the other relief which he seeks and which is not available under any circumstances in the administrative process—costs, attorneys' fees, and damages other than back pay.

[26] The statistics in n.28 of the government's brief, whose accuracy is concededly in doubt, suggest there were only 40 awards of back pay among the 180 cases in which discrimination was found in 1974.

III.

Section 717 Requires a Trial *De Novo*.

In its brief in this case the government urges that repeal of all pre-1972 remedies and adoption of one of its exhaustion standards are necessary to avoid interfering with what the Solicitor General maintains is a critical purpose of section 717—to deprive federal employees of trials *de novo*. R. Br. 32. Petitioner maintains that, even if section 717 does not authorize a trial *de novo* in some or all circumstances, that is no reason to imply a repeal of the other statutes in question or to establish any of the exhaustion rules advanced by respondents. In light of this contention by the government, however, petitioner believes it appropriate to offer certain comments on the arguments advanced by the government in *Chandler* v. *Roudebush*, No. 74-1599.

It is helpful to note what is, and is not, at issue in *Chandler*. The two practical consequences of whether there is a trial *de novo* are first, whether the court should consider additional evidence not contained in the administrative record, and, second, whether the court should make independent determinations of fact. Regardless of whether there is a trial *de novo*, there is no need to redo all that occurred in the agency proceedings; that record would, subject to the normal rules of evidence, be directly admissible in court. On the other hand, as the government recognizes, the court would be required to become fully familiar with all the facts of the case, at least so far as they can be determined by reading the administrative record, regardless of what standard it applied.

The government, while insisting that a trial *de novo* is not automatically required by section 717, recognizes a variety of circumstances when such a trial would be re-

quired. The government's approach would require the sort of complex and time consuming case by case evaluation of the prior non-judicial proceedings which led this Court to reject any deferral to the decisions of arbitrators in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 59 (1974).

(1) The government concedes that a trial *de novo* is required where the agency fails to reach a final decision within 180 days, as required by the regulations. 5 C.F.R. § 713.281(b). The government asserts that such violations of the regulations are "isolated", "rare" and "infrequent." Brief for Respondent in *Chandler* ("C. R. Br.") C. R. Br. 15, 74. In fact, however, the *average* time for processing administrative complaints is 201 days.[27] P. Br. 22a. Only last year the Chairman of the Civil Service Commission testified that it had not been able to bring most agencies into compliance with the regulations.[28] It is clear that a substantial majority of all federal employees would, under this exception, be entitled to a *de novo* hearing.

(2) The government recognizes that the court would be obligated to admit any relevant additional evidence which was not contained in a defective record. The Solicitor General stresses that the responsibility for seeking and producing this evidence belongs to the agency; the aggrieved

[27] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination, p. 80 (1975). The average period for processing such complaints is 367 days in the Department of Health, Education and Welfare, 369 days in the Department of Housing and Urban Development, and 395 days in the Department of Transportation.

[28] Referring to the problem of delay in processing these complaints, Chairman Hampton stated, "This issue was raised last year, and the year before, ever since the passage of the act, and I don't think we have been very successful in getting down the number of days that it takes to process complaints." Oversight Hearings Before the Subcommittee of the House Committee on Education and Labor, 94th Cong., 1st Sess., 1972 (1975).

employee need only complain and offer evidence in his personal possession. C. R. Br. 13, 19, 59, 63, 64-5, and notes thereto. In a part 713 proceeding, unlike for example, an I.C.C. rate hearing, virtually all the relevant evidence is in the hands of the agency; the documents are agency documents and the witnesses are agency employees. This "exception" would be arguably applicable to every instance where an employee wanted the court to consider such additional evidence. The administration of this exception would require the court to permit full discovery and then hold a special hearing to determine if there was any legitimate reason why the agency had failed to produce new evidence thus unearthed.

(3) Under part 713 the hearing is conducted by a complaints examiner but the decision is rendered by the agency head, or his designee, in Washington 5 C.F.R. § 713.218(g). This means that demeanor evidence is *never* available to the agency official who actually makes the determination as to whether there was discrimination. In any case in which demeanor was important the agency proceeding would be inherently defective, since it would have been decided by an official who clearly would not consider all the relevant evidence. This occurred in both *Chandler* and *Salone* v. *United States*, No. 74-1600. An aggrieved employee is entitled to have his case decided by someone who has seen the demeanor evidence. The court would thus be obligated to consider, in each case, whether demeanor evidence was relevant, and if so to require the relevant witnesses to testify in court.

(4) The government justifies the substantial evidence rule by insisting that agency officials who decide these cases are in general, or at least under the regulations ought to be, both unbiased by their dual role as defendant and judge and expert in both personnel matters and Title VII law. If,

in this regard or others, there is a defect in the process as to any particular case, the government maintains that defect is to be remedied in the subsequent judicial proceeding. C. R. Br. 64. But this can only mean that, prior to applying a substantial evidence rule based on assumptions as to the agency's fairness and expertise, the court would be obligated to conduct a detailed factual inquiry, at least if asked to do so by the employee, into whether those assumptions were indeed correct.

(5) The government properly concedes that any error of law in the administrative process can and must be overturned by the court. In all section 717 cases this exception would require that every non-factual decision that was or should have been made, including every inference and every decision refusing to admit evidence, would have to be reconsidered by the district court.

One or more of these exceptions to the government's rule would be potentially applicable to virtually every case. The very process of deciding whether to afford a trial *de novo* would be complicated and time consuming, and inextricably interconnected with the merits of the case. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the government opposed any deference to the decisions of arbitrators because "under such a procedure, 'the district court would find itself holding a hearing to determine if [deference] was appropriate, which hearing could . . . in length and complexity be similar to a Title VII trial'".[29] This is equally true with regard to hearings to decide whether to give a trial *de novo*. Were the Court to adopt the government's position, it would be necessary to remand *Chandler* and *Salone* to consider, *inter alia*, whether the defendants

[29] Brief for the United States as Amicus Curiae, No. 72-5847, p. 29.

have any relevant evidence not contained in the record, whether there was any relevant demeanor evidence, whether the agency officials who decided the case were unbiased and expert in both personnel and Title VII matters, and whether any evidence was erroneously excluded. We submit it would be more expeditious, and more consistent with the purposes of section 717, to remand these cases for a simple trial.

In an amicus brief in *Chandler* we previously contended that, in the four years since section 717 was adopted, no federal employee had ever been able to win a case under the government's standard, and that every court limiting itself to that standard had concluded that the agency decision in dispute was supported by substantial evidence.[30] The government maintains this "incorrect", and cites six cases. C. R. Br. 71, n. 45. None of the six cases relied on by the government applied its substantial evidence rule; in each of them the court insisted, instead, on making an independent determination of the relevant facts.[31] Nor did the court in any of these cases restrict in any way the right of the plaintiff to discover and introduce, in addition to the

[30] Brief of the N.A.A.C.P. Legal Defense & Educational Fund, Inc., as *Amicus Curiae*, No. 74-1599, pp. 11-12, n.10.

[31] See, e.g., *Day* v. *Weinberger*, 8 EPD ¶ 9771 p. 6224 (D.D.C. 1974) ("[T]he review of this Court is not limited to the test of whether there is substantial evidence in the record to support the decision of the administrator . . . this Court must make its own decision based upon all relevant evidence"); *Napper* v. *Schnipke*, 393 F.Supp. 379, 385 (E.D. Mich. 1975) ("[T]he court must determine, based on the same standards used in private discrimination suits, whether the complainant has come forward with proof suggestive of discrimination, and whether in such a case an employer has established an absence of discrimination by a preponderance of the evidence.")

administrative record, any other evidence he wished.[22] To permit the discovery and introduction of such evidence, and to require an independent judicial determination of the facts, is the same thing as mandating a trial *de novo;* the cases relied on by the government are unusual only in that, in several of them, the court gave the plaintiff a trial *de novo* but declined to so label the proceeding.

IV.

The Inadequacy of the Administrative Procedure.

The House Committee on Education and Labor, the Senate Committee on Labor and Public Welfare and the United States Commission on Civil Rights have all concluded that the administrative procedure for handling complaints of employment discrimination is entirely ineffective, and in some cases actually impedes the elimination of such discrimination. The Solicitor General does not claim that Congress and the Commission on Civil Rights erred in their conclusions. Nor does the Solicitor General suggest that he has conducted an independent investigation into whether the administrative procedure is, in fact, effective in eliminating employment discrimination. In its brief in this case the government maintains that any defects in the procedure are the exclusive concern of the Civil Service Commission and should not be considered by the courts, R. Br. 50; in *Chandler* the government contends that the courts can and should deal with such defects, not in formulating any general rules for section 717 actions, but only on a case by case basis. C. R. Br. 64. In the instant case the government suggests it is reasonable to "assume" that any defects which existed in 1972 have by now been cured, R. Br. 46; in *Chandler* the government argues that any failure of the Civil Service Commission to deal with those defects is irrelevant. C. R. Br. 37, n.18. The government stresses the existence of regulations authorizing the agencies and Civil Service Commission to act in a salutary manner, R. Br. 36-43, but does not allege that these powers are often or ever exercised. Petitioner's contentions of fact regarding the administrative process are set out in an appendix, pp. 1aa-12aa; the Solicitor General has, in general, declined to take a position on these specific factual issues.

[22] See, e.g., *Robinson* v. *Warner*, 8 EPD ¶ 9452, p. 5058 (D.D.C. 1974) ("At the District Court level, the full gambit of discovery tools can be utilized, including testimony in open court, to supplement the administrative record . . . this procedure will ensure to federal employees that the Court will evaluate *all* the relevant evidence and at the same time prevent an unnecessary duplication of effort.")

The record in this case contains no facts that would support any contention that the findings of the Congress and Civil Rights Commission were in error. It was only at oral argument in the court of appeals that the government first argued that petitioner had not adequately exhausted the administrative remedies, and it was only in its brief in this Court that the government sought to justify such an exhaustion requirement by reference to the nature of the administrative procedure. In the interest of clarifying the underlying factual situation, counsel for petitioner, on November 26, 1975, wrote to the Solicitor General asking for specific statistics bearing on arguments in the government's brief regarding the administrative procedure. Pp. 17aa, 24aa. On February 13, 1976, the Solicitor General declined to provide that information on the ground that the inquiries were "in the nature of pretrial discovery requests or call for legal conclusions or interpretations," or, in some instances, because the information did not exist. Pp. 25aa-27aa. The fact that none of the material was

developed through discovery in the district court is entirely the responsibility of the government, which did not put the matter in issue until it was on appeal. Under these circumstances the congressional findings regarding the defects of the administrative process must be accepted by this Court. *Communist Party* v. *S.A.C. Board,* 367 U.S. 1, 94-95 (1961).

In this case and *Chandler* the government urges that federal employees should have fewer judicial remedies than private employees because the administrative process available to federal employees is more efficacious than the process of investigation and conciliation available to private employees through E.E.O.C. R. Br. 52; C. R. Br. 61. It is true that the E.E.O.C., unlike the officials under part 713, cannot directly order any relief, but in a part 713 proceeding the officials with authority to direct a remedy are also, for all practical purposes, the defendants. Petitioner maintains that the independence of the E.E.O.C., and the resulting vigor and expertise of its staff, are far more important than the nominal but unused powers of agency officials and the Civil Service Commission. This difference is well illustrated by comparing the results of the E.E.O.C. and part 713 proceedings. In the last fiscal year 26,627 federal employees complained to EEO counsellors; out of this group back pay was awarded to less than 50. P. Br. 85; R. Br. 49. The E.E.O.C. received a total of 55,885 charges of discrimination, and obtained through conciliation back pay for 49,388 individuals. Pp. 13aa-14aa.

There appears to be a problem of discrimination in the selection of the personnel who administer the administrative procedure. Although 34% of all federal employees are women, only 2.2% of the Civil Service investigators and 10.7% of the complaints examiners are women. While

minorities are 21 per cent of all federal employees, only 4.3% of the Civil Service investigators and 10.7% of the complaints examiners are non-white. Pp. 16aa-17aa. In half of the 10 Civil Service regions all these investigators are white males.[33] A serious claim of racial discrimination in the selection of Appeals Review Board personnel is now the subject of litigation in the District Court for the District of Columbia.[34] The government concedes that, in cases decided on the merits, the Appeals Review Board affirms findings of discrimination in 98% of all cases. R. Br. 57. The government urges, however, that the affirmance rate of the courts of appeals is also high. R. Br. 58. But the significance of the affirmance rate must take into account what occurred below. In the agency proceedings the agency finds itself innocent of discrimination in at least 87% of all cases decided on the merits;[35] no such pattern exists among the district courts.

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[33] Atlanta, Denver, Chicago, Boston and Seattle.

[34] *Griffiths* v. *Hampton* (D.D.C. No. 75-1509).

[35] Oversight Hearings Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess., p. 169 (1975).

CONCLUSION

For the above reasons, the judgment and opinions of the Second Circuit should be reversed.

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APPENDIX

Appendix A

Factual Contentions Concerning Working of the EEO Procedures

Introductory Note: This appendix lists the various assertions that have been made concerning the adequacy of the Civil Service Commission's EEO procedures. The listing is done on a chronological basis, *i.e.*, from the beginning of the process at the counseling stage through the appeal to the Appeals Review Board. Three additional sections cover corrective action, alternative procedures, and matters generally applicable to the entire procedure. The sources for each statement are cited as follows: (1) United States Commission on Civil Rights, Report, *The Federal Civil Rights Enforcement Effort, 1974,* Volume V, to Eliminate Employment Discrimination—*e.g.*, "C.R.C., p. 61 (p. 3aa)";* (2) Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae,* in *Chandler* v. *Roudebush,* No. 74-1599, *e.g., "Chandler amicus,* p. 7a"; and (3) the Brief for Petitioner in the present case, *e.g., "Brown,* p. 63."

In those instances where the government has responded to an allegation, the response is cited in a footnote, with references to either the government's brief in *Brown, e.g.,* "U.S.B., p. 50," or *Chandler, e.g.,* "U.S.C. p. 58, n. 33."

I.

Counselling

1. The Civil Service Commission (CSC) refuses to recognize the concept of a continuing violation. (C.R.C., p. 65 (p. 7aa)); *Chandler amicus,* p. 12a).

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* The page number in parenthesis is a citation to Appendix B to petitioner's main brief in this case, which reproduces a portion of the Civil Rights Commission Report.

Appendix A

2. Corrective action is not given for any act occurring before 30 days prior to the complainant going to a counselor (*Chandler amicus*, p. 12a).

3. The 30-day filing requirement is strictly enforced despite § 713.214(a)(4). (*Chandler amicus*, p. 13a).[1]

4. Counselors are not full-time EEO persons (*Chandler amicus*, p. 14a).

5. Counselors can seek only an informal resolution. Corrective action cannot include back pay or a retroactive promotion; it is usually limited to "training" or "consideration" for a position that often does not materialize (*Chandler amicus*, p. 14a, CRC, p. 67 (9aa)).

6. There is no accurate data as to what kind of corrective action is provided through counseling (*Chandler amicus*, p. 15a).[2]

7. Only 10% of complainants file formal complaints because many are misled, intimidated, or not encouraged to file. (*Chandler amicus*, p. 15a; CRC, p. 66 (8aa)).[3]

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[1] The government has not contested the accuracy of this statement, but has only sought to justify the practice by drawing an analogy to the 30-day statute of limitation for filing suit (U.S.C. p. 56, n.30). The attempted analogy fails, however, since a complainant is informed of the 30-day limitation period by a letter whose receipt begins the period's running.

[2] The government, in its letter to counsel for petitioner, acknowledges that the CSC does not have reliable data as to corrective actions taken (App. B, *infra*, p. 26aa).

[3] Although not directly denying that many complainants do not file because of improper actions by counselors, the government suggests that many do not because of adequate corrective actions (U.S.C., p. 57, n.31). As pointed out in n.2, however, the government also acknowledges that there is no reliable data as to what kind of corrective actions are provided.

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II.

Complaint Filing

8. The fifteen day rule for filing the formal complaint is rigidly enforced despite the language of § 713.214 (a)(4). (*Chandler amicus*, p. 16a).

9. Complaints are rejected because they are sent to the wrong office (*Ibid*).

10. Some agencies do not consider the complaint filed until receipt is formally noted; this is delayed by EEO officers attempting to resolve the matter informally (*Ibid*).

11. Complaints must name a specific "alleged discriminatory official," and are rejected as not being specific enough if they do not. (*Chandler amicus*, pp. 16a-17a).

12. Focus of the entire process is still on individual overt acts of discrimination despite congressional criticism. (CRC, pp. 65-66 (7aa-8aa); *Chandler amicus*, p. 17a).[4]

13. A significant number of complaints are rejected as "not within the purview" of the Chapter 713 regulations. (CRC, p. 68 (10aa); *Chandler amicus*, p. 19a).

14. The Commission has refused to allow class complaints to be raised as part of the individual complaint process. (CRC, pp. 68-69) (10aa-11aa); *Chandler amicus*, p. 19a).

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[4] The government does not deny this, but rather defends this practice. (U.S.C., pp. 68-69, 75, n.48). Indeed, the thrust of the respondent's brief in *Chandler* is based on the same misapprehension of a Title VII proceeding as has the CSC, *viz.*, the inquiry is limited to whether a particular supervisor is prejudiced.

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15. If a complainant follows a wrong procedure, his complaint is forever barred even if his initial attempt is timely. (*Chandler amicus,* pp. 23a-24a).

16. A complainant (and federal employees generally) are not given any explanation or guidance as to alternate procedures or the consequences of following one procedure rather than another (CRC, pp. 64-65 (6aa-7aa); *Chandler amicus,* pp. 29, 23a).

17. EEO officers are often part of the same division as are personnel officers who may be the target of EEO complaints (*Chandler amicus,* p. 28).

III.

The Investigation

18. EEO investigators are virtually always employees of the agencies. (CRC, p. 70 (p. 12aa); *Chandler amicus,* p. 24a).

19. Investigators lack expertise in Title VII law and need not have particular expertise in relevant personnel matters. (*Chandler amicus,* p. 20; CRC, p. 70 (p. 12aa)).

20. Investigations are severely limited as to both time and scope in contrast to EEOC investigations (CRC, pp. 71-75 (13aa-18aa); *Chandler amicus,* p. 25a).[5]

21. The investigator is instructed not to enlarge the scope of the investigation beyond the specific issue complained of (*Chandler amicus,* p. 25a).

[5] The government does not deny that investigations are in fact so limited; it asserts that a "proper" investigation "should normally" be sufficient, without giving any data as to whether any such investigations are conducted. (U.S.C., p. 64, n.39).

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22. Complainant has no way, such as discovery devices, to require the investigator to look into any particular matter, has no control over the scope of the investigation, and does not have the right to be present or have questions asked of witnesses (*Chandler amicus,* pp. 25a-26a).

23. The investigator must rely on local agency personnel for information (*Ibid*).

24. Investigative reports commonly consist of a compilation of conclusory affidavits as to whether a particular person is discriminatory. (*Chandler amicus,* p. 26a).

25. Proposed resolutions are limited; back pay cannot be given, and the typical relief is training or "consideration" for future vacancies. (*Chandler amicus,* p. 27a).

IV.

Hearing

26. Complaints examiners do not have expertise in Title VII law. (CRC, p. 76 (18aa); *Chandler amicus,* p. 28a).

27. A complainant has no right to conduct discovery through interrogatories, pre-hearing examination of witnesses or documents, or otherwise, and requests to do so are denied. (*Chandler amicus,* pp. 25, 28a).[6]

[6] The government asserts that denials of "reasonable" requests for information can be corrected. It does not claim, however, that such requests can be other than for production of evidence *at the hearing* itself, nor does it give any indication as to the number of occasions on which *any* denials are reversed. (U.S.C., p. 64, n.39).

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28. Non-government employee witnesses cannot be made to testify. (*Chandler amicus,* p. 26).

29. The agency has full access to documents and witnesses *before* the hearing so as to be able to fully prepare its case. (*Chandler amicus,* p. 28a).

30. Complainants are generally represented by lay persons, while agencies are usually represented by counsel. (*Chandler amicus,* p. 29a).[7]

31. The hearing is not adversary in nature (CRC, p. 77 (19aa); *Chandler amicus,* p. 29a).

32. Although a complaints examiner has the responsibility to elicit testimony and obtain witnesses and evidence, he often fails to do so. (*Chandler amicus,* pp. 29a-31a).

33. Complaints examiners refuse to obtain witnesses and documents requested by complainants, and rules restrictively as to the relevance of evidence. These evidentiary rulings are routinely upheld by the Appeals Review Board. (CRC, p. 78 (20aa); *Chandler amicus,* pp. 27, 30a-31a).[8]

[7] The government does not deny either assertion. It only states that complainants "often have *available* . . . attorneys without charge," without stating how often complainants are in fact represented. (U.S.C., p. 58, n.33). The government notes the Department of Justice's program of allowing its attorneys to represent employees from other agencies. To our knowledge, however, this authorization (as opposed to representing complainants within the Department of Justice) was only disseminated in November, 1975 (Office of the Attorney General, Memorandum to All Employees, Subject: Representing Equal Employment Opportunity Complainants, November 20, 1975).

[8] The government asserts that "the complainant has complete authority over the way his complaint is presented." (U.S.C., p. 64, n.38), but does not deny that, as a fact, evidence the complainant wishes to introduce is routinely rejected and such rejections are routinely affirmed. We believe that the government's assertion is simply wrong; as recently as September 16, 1975, CSC/ARB again reaffirmed the *Complaints Examiners'* power over the conduct of the hearing and what evidence would be introduced or even looked at. Their decisions would be reversed only if "arbitrary or capricious" (ARB decision RB 071360169 Digest 2, p. 31).

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34. Although a complainant purportedly does not have the burden of proof (U.S.C., p. 62, n. 37), in case after case if he does *not* prove his case he is ruled against and the decision is affirmed by CSC/ARB. (CRC, p. 78 (20aa); *Chandler amicus,* p. 30a).

35. The complainant does not have the right to see, review or comment upon the recommended decision or transcript prior to the final agency decision. (*Chandler amicus,* 31a).

36. The provision requiring that if an agency does not follow an examiner's recommendation, it must give detailed reasons, is not effectively enforced. (CRC, p. 79 (21aa); *Chandler amicus,* pp. 28, 31a).[9]

37. In Fiscal Year 1974, agencies reversed and refused to adopt 26.6% of the recommended findings of discrimination, but only 1.3% of the findings of *no* discrimination. (CRC, p. 79 (21aa); *Chandler amicus,* p. 32a).

38. Recommended and final agency decisions do not cite Title VII law, and typically limit the inquiry to whether there is proof of overt discrimination by a particular person (*Chandler amicus,* pp. 20, 24).

[9] The government has asserted, without giving figures, that CSC/ARB "has *on occasion* remanded cases" for failure to give reasons. (U.S.C., p. 60, n.34).

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39. In the majority of cases there are *not* final agency decisions within 180 days from the date of filing the complaint. (CRC, p. 80 (22aa)).[9a]

40. Complainants are not informed that they waive any rights by choosing not to have a hearing. (*Chandler amicus*, p. 15, n. 14).

V.

Appeal To CSC/ARB

41. In the last three fiscal years, ARB reversed findings of no discrimination in only 3.32% of the cases decided on the merits. (*Chandler amicus*, p. 33a; see also, CRC, p. 82 (24aa)).

42. Including decisions ordering further corrective action there are favorable ARB decisions on other than procedural questions in less than 10% of the appeals. (*Chandler amicus*, p. 33a).

43. The requirement that agencies act in 180 days is not in fact enforced by the CSC (*Brown*, p. 63).

44. ARB members have no expertise in Title VII law or federal personnel matters (*Brown*, p. 65, n. 129; CSC, p. 81 (23aa)).

45. ARB has been sued under Title VII by its black, female member for racial and sex discrimination in promotions; ARB votes have split along racial lines. (*Brown*, p. 65).

46. ARB decisions are *ad hoc*, do not cite or follow Title VII cases, and are not followed as precedent. (CRC, p. 83 (25aa); *Brown*, p. 65).

[9a] The government asserts that such cases are "isolated", but offers no specific statistics. (U.S.C., p. 24).

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47. The volume of cases precludes adequate consideration of records. (*Brown*, p. 65).[10]

48. ARB decisions are in reality written by a small number of unqualified appeals examiners. (*Brown*, p. 65; See, CRC, p. 81, n. 277 (23aa).

49. The Civil Service Commission itself has considered reopening ARB decisions only *8* times; only *6* cases were actually reopened. (*Chandler amicus*, p. 3a).

50. CSC does not issue opinions in the reopened cases; its orders are secret and explanatory documents difficult to obtain even though the orders establish precedent. (*Chandler amicus*, pp. 30, 3a-4a).

VI.

Corrective Action

51. Awards of back pay and retroactive promotions are rare. The standard relief given is "training". (CRC, pp. 83-85 (25aa-27aa), *Chandler amicus*, p. 24, 34a).

52. In contrast, the EEOC has obtained substantial back pay relief for large numbers of private employees (*Chandler amicus*, pp. 34a, 91a).[11]

53. Relief to the class or to any person other than the complainant is not given by complaints examiners, agencies, or ARB (*Chandler amicus*, pp. 24, 35a).[12]

[10] The government asserts that ARB "reviews" the records in the cases it decides. (U.S.C., p. 60).

[11] The government urges that the EEOC lacks power to enforce Title VII rights, whereas the CSC has such power (U.S.B., p. 52, n.34). The government does not deny, however, that the actual results achieved by the EEOC far outstrip the CSC.

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54. No back pay, either to a class or individuals has ever been awarded in a third-party complaint proceeding under § 713.251 (*Chandler amicus*, p. 35a).

VII.

Alternative Procedures

55. Complainants have not obtained effective relief against harassment or reprisals for filing a discrimination complaint under 713.262(b). (*Chandler amicus*, p. 36a).

56. If discrimination claims are raised under an alternative procedure (e.g., adverse action or grievance), the discrimination claim is not reached if the adverse action is reversed on a procedural ground, hence leaving the underlying discrimination claim unresolved (*Chandler amicus*, p. 37a, and see case cited at 7a, n.2 (now reported at 10 E.P.D. ¶ 10,521)).

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[12] The government asserts that "the *Commission* . . . possesses the power to remedy systemic or class-wide bias on the administrative level." (U.S.C., p. 65, n.40). As a legal proposition, that is true; indeed we would go further and say that the Commission has not only the power but the *duty* to do so, and that is the basis of the action we successfully prosecuted in *Barrett* v. *United States Civil Service Commission*, 10 E.P.D. ¶ 10,586 (D.D.C. 1975), now cited with approval in the government's brief in *Chandler*, (p. 65, n.40). The issue is not whether the Civil Service Commission has the power to do what is required by law, but whether, as a matter of fact, it has permitted investigators, complaints examiners, agencies, and ARB to remedy class discrimination by granting broad relief and back pay. As stated in *Chandler amicus* brief, and not denied by the government, the Commission has prohibited such relief.

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57. A complainant who opts to proceed under an alternative procedure is not informed by the CSC of his right to file under Title VII even if the merits of his discrimination claim are reached (*Chandler amicus*, pp. 37a-38a).

58. If a complainant files a complaint under part 713 charging that a job qualification is discriminatory and if the qualification in question is one imposed by the CSC, his complaint is simply rejected as "not within the purview" of part 713 and he is not informed of the proper procedure under part 300 (*Chandler amicus*, p. 23a).

VIII.

Criticisms Relating to the System Generally

59. The investigation hearing, and other significant provisions of the 713 regulations were not changed in any meaningful way after the 1972 act was passed (CRC, pp. 61-62 (3aa-4aa); *Chandler amicus*, p. 19).

60. Manuals, ARB decisions, investigative reports, proposed decisions and final agency decisions are devoid of citations to Title VII law and court decisions and do not comply with either (*Chandler amicus*, pp. 20-25; see also, CRC, pp. 77-78).[13]

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[13] The government acknowledges that agencies and the CSC are bound to follow Title VII law, U.S.C., p. 62. In light of *Morton* v. *Mancari*, 417 U.S. 535 (1974), it could hardly do otherwise. The government does *not* deny, however, that *in fact* Title VII law is *not* followed. Indeed, the government's brief shows the same lack of understanding of Title VII law that characterizes CSC regulations and decisions in its discussion of the "but for" rule (U.S.C., p. 62, n.37). What is wrong with 5 C.F.R. § 713.271 is its reversal of the burden of proof in complete disregard of Title VII decisions of Courts of Appeals and this Court.

Appendix A

61. The Civil Service Commission reversal of the ARB decision described on pages 22-23 of the *Chandler amicus* brief resulted in the subsequent disregarding of statistical evidence in violation of Title VII law (*Chandler amicus*, p. 23, n.19).[14]

62. There are no enforced sanctions when agencies fail to comply with time requirements supposedly imposed on them by the regulations (*Chandler amicus*, pp. 29-30).[15]

63. Agency heads and those delegated to decide EEOC cases have no expertise in either EEO or personnel matters (*Brown*, pp. 49-50).

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[14] The government asserts that "the Commission has considered statistical evidence of discrimination in adjudicating complaints," and cites the case of *Evans* v. *Lynn*, D.D.C. Civ. No. 630-73 (U.S.C., p. 65, n.40). What the government does not say is that statistical analyses are utilized to *negate* claims of race or sex discrimination, and that *Evans* v. *Lynn* is such a case. Indeed, many investigative reports, agency and ARB decisions contain an exceedingly superficial statistical analysis presented from management's viewpoint (cf. *Rich* v. *Martin-Marietta*, 522 F.2d 333, 342-3 (10th Cir. 1975)) that purports to show no discrimination. Contrary to the government's position, the non- or mis-use of such data is highly relevant to the question of whether such administrative decisions should be given any weight whatsoever by a federal court charged with enforcing Title VII.

[15] The government claims that petitioner here should have sought relief from the Commission for the failure by the agency to comply with the time requirements (U.S.B., pp. 55-56). No claim is made that the Commission in fact responds to such requests. For an account of the futility of attempting to get such action, see the case described on page 7a, n.2 of the *Chandler amicus* brief. As of the end of February, 1976, the CSC has still not even acknowledged receipt of the request to require processing of the complaint in that case.

Appendix B

[EMBLEM]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

November 21, 1975

IN REPLY REFER TO:

Mr. Eric Schnapper
NAACP Legal Defense and Educational Fund
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

This is in response to your telephone call of November 20, requesting data on the number of individuals who received back pay from EEOC conciliation agreements and the cumulative dollar figure of this back pay.

In FY 1975, the number of persons benefitted was 51,216; the dollar figure was $109,669,285; and the number of successful conciliations was 5,983.

In FY 1974, the number of persons benefitted was 49,388; the dollar figure was $56,266,827; and the number of successful conciliations was 4,519.

I hope that this information is useful.

Sincerely yours,

/s/ MARTY ROGERS
Marty Rogers
Special Assistant to the
Executive Director

Appendix C

[Emblem]

Equal Employment Opportunity Commission
Washington, D.C. 20506

December 15, 1975

IN REPLY REFER TO:

Eric Schnapper, Esquire
Legal Defense Fund
Room 2030
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

This is in response to your request for data on the total number of charges received by the Equal Employment Opportunity Commission in Fiscal Years 1974 and 1975.

In Fiscal Year 1974, the EEOC received 55,885 charges of discrimination. In Fiscal Year 1975, the total number of charges received was 64,542.

Sincerely,

/s/ Marty Slate
Marty Slate
Supervisory Attorney
Office of General Counsel

Appendix D

[Emblem]

United States Civil Service Commission
Washington, D.C. 20415

December 16, 1975

IN REPLY PLEASE REFER TO
YOUR REFERENCE

Ms. Phyllis McClure
Legal Defense Fund, NAACP
1028 Connecticut Avenue, N.W.
Suite 510
Washington, D. C. 20036

Dear Ms. McClure:

The following information is provided in response to your request of December 2. I am able to provide data on the EEO investigators on a regional basis as requested, but our data on employees serving in the Federal Employee Appeals Authority is maintained on a composite basis.

As of December 8, 1975, the Federal Employee Appeals Authority had a nationwide professional staff of 103 persons to adjudicate appeals and hold hearings for Federal agencies on discrimination complaints. By sex, 92 (89.3 percent) were men and 11 (10.7 percent) were women. By minority-nonminority designations, 92 were non-minority and 11 were minority, with the following subdivisions by minority category: 9 Black, 1 American Indian, and 1 Oriental-American.

Appendix D

We have a total of 517 investigators in our 10 regions and Washington; of whom 184 have been trained to investigate EEO complaints, and of whom 52 are minority and women employees (28 White women, 1 Black woman, 8 Black men, 11 Spanish-surnamed men, and 4 Oriental-American men). Within the body of 184 investigators who are trained to investigate EEO complaints, 12 are minority and women (4 White women, 2 Black men, 3 Spanish-surnamed men, and 3 Oriental-American men). By regions and the Washington investigations office, the numbers of minority and women investigators trained to conduct EEO investigations are as follows: Atlanta, none; Boston, none; Chicago, none; Dallas, 1; Denver, none; New York, 2; Philadelphia, 1; Seattle, none; San Francisco, 4; St. Louis, 1; and Washington, 3.

Sincerely yours,

/s/ Joseph E. Oglesby
Joseph E. Oglesby
Director, Media Services
Office of Public Affairs

The Merit System—
A Good Investment In Good Government

Appendix E

November 26, 1975

Hon. Robert Bork
Solicitor General
Department of Justice
Washington, D.C.

Re: *Brown* v. *General Services Administration*

Dear Mr. Bork:

The government's brief includes a number of statements concerning the administrative process for complaints of employment discrimination and statistics regarding the actual operation of that system. Because of the manner in which this case arose, there is nothing in the record with regard to these statements and statistics. We would be most grateful if you could provide the following information to clarify the portions of the brief referred to so that we may respond in appropriate manner. Unless otherwise stated our request is for information for the most recent fiscal year available.

1. The government's brief, at p. 49, states that 35 to 45 percent of "informal complaints" are followed by "some sort of corrective action." Please state the total number of such complaints, and the number of instances in which each of the following types of corrective action is taken, i.e., (1) back pay awarded, (2) retroactive promotion, (3) immediate promotion, (4) promotion preference, (5) reinstatement, (6) reassignment, (7) reduction of adverse action, (8) rescission of adverse action, (9) improvements in personnel practices (explain), (10) improvement in equal

Appendix E

employment opportunity practices (explain), (11) training for complainant, (12) training for person charged with discrimination, (13) disciplinary action against person charged with discrimination, (14) upgrade complainant's performance rating, (15) other (specify).

2. The government's brief states that the term "retroactive relief" in the Civil Rights Commission report includes only back pay, not retroactive promotions. P. 49, n. 28. Please state the number of cases in which retroactive promotions were granted (a) at the informal counseling stage, prior to the filing of a formal complaint, (b) through counseling after the filing of a formal complaint, (c) as part of final agency action, (d) by the Commission (e) by the Appeals Review Board.

3. The government's brief, at p. 49, n. 28, states that the 22 cases of back pay excludes awards of back pay (a) at the informal counseling stage and (b) by the Commission on appeal. Please state the number of cases in which back pay was awarded (1) at the informal counseling stage prior to the filing of a formal complaint, (2) through counseling after the filing of a formal complaint, (3) by the Appeals Review Board on appeal, (4) by the Commission on appeal. State the number of persons to whom back pay was awarded at each stage, if different from the number of cases.

4. The government's brief, p. 49, n. 28, states that of the 985 cases of corrective action, 4% involved awards of back pay, 6% retroactive promotions, and 10% "prospective promotions." Are the actual numbers 39, 58, and 157 respectively? What is the total number of cases in which both back pay and retroactive promotion was awarded?

Appendix E

5. The government's brief, p. 49, n. 28, refers to a form of corrective action called "prospective promotion." Does this mean (a) an immediate promotion, (b) guaranteed promotion into the next vacancy, (c) priority consideration for promotion into the next vacancy, or (d) consideration for promotion into the next vacancy. To the extent "prospective promotion" includes (b), (c), or (d), please state the number actually promoted within one year of the award of "prospective promotion."

6. We would like to examine the agency decisions in the cases referred to in n. 28, p. 49, of the government's brief, in which either back pay or retroactive promotion was awarded. Please advise us where and how this can be done.

7. The government's brief, p. 50, n. 30 states that there was a finding of discrimination in 7 percent of all final dispositions. Since the total number of such dispositions was 2650, was the total number of findings of discrimination 185? Among the cases in which discrimination was found, in how many cases did the corrective action ordered include (1) back pay, (2) retroactive promotion, (3) immediate promotion, (4) promotion preference, (5) reinstatement, (6) reassignment, (7) reduction of adverse action, (8) rescission of adverse action, (9) improvements in personnel practices (explain), (10) improvements in equal employment opportunity practices (explain), (11) training for complainant, (12) training for person charged with discrimination, (13) disciplinary action against person charged with discrimination, (14) upgrade complainants performance rating (15) other (specify).

8. The government's brief, pp. 11 and 38, states that the processing of a complaint must be prompt. Please state,

for the government as a whole and for each agency for which statistics are available (a) the number and percentage of complaints in, or at the end of, the latest fiscal year, which were over 180 days old and thus in violation of the 180 day rule provided by 5 C.F.R. §713.220(a), (b) the average age of complaints in, or at the end of, the latest fiscal year, (c) with regard to the last fiscal year in which the 60 day rule was in effect, the number and percentage of complaints over 60 days old, and the average age of all complaints in, or at the end of, that year.

9. The government's brief states that the complaints examiner may make recommendations regarding "the general environment out of which the complaint arose" p. 40, and that the regulations "authorize broad remedial action by the agency or the Commission." Please state (a) whether the examiner may recommend class-wide relief in a case under §§713.213-236, (b) whether he must do so in such a case under certain circumstances and if so what circumstances, (c) whether the agency, Appeals Review Board or Commission may order class-wide relief in a case under §§713.213-236, (d) whether they must do so in such a case under certain circumstances, and if so what circumstances, (e) the number of cases in which class-wide discrimination was found (i) under §§713.213-236 and (ii) under §713.251, (f) the number of cases in which class-wide retroactive promotion was ordered (i) under §§713.213-236 and (ii) under §713.251, and (g) the number of cases in which class-wide back pay was ordered (i) under §§713.213-236 and (ii) under §713.251.

10. The government's brief states that the complaints examiners must be "impartial" and "qualified". Pp. 11, 51.

Please state, for each of the Civil Service regions, the number of complaints examiners (a) who are white-male, white-female, black-male, black-female, and (b) who have experience in civil rights matters acquired (i) as employees of E.E.O.C., (ii) as employees of the Commission on Civil Rights, (iii) as employees of the Civil Rights Division of the Department of Justice, (iv) in private practice as counsel for civil rights litigants (v) other (specify).

11. The government's brief states that each complainant has the right to be represented by "a representative of his own choosing." P. 41. Please state (1) the number and percentage of complainants represented by counsel at the hearing, and (2) the number and percentage of cases in which the defendant agency or its officials were represented by counsel paid for by the government at the hearing.

12. The government's brief states that a recommended decision finding discrimination becomes binding within 30 days if not overturned within that time. P. 42. State the number of instances in which such a finding actually became binding for this reason.

13. The government's brief states that, following final decision by the Board, the Commission "may reopen and reconsider any decision." P. 40. State the number of occasions when the Commission actually did so.

14. The government's brief states that the Board may arrange for "additional investigation to be conducted by Commission personnel." P. 40. State the number of times that this has actually occurred and the type of investigation conducted.

Appendix E

15. The government's brief states that the regulations "*authorize* broad remedial action by the agency" on a finding of discrimination in a 5 C.F.R. §713 administrative proceeding. P. 41. Do these regulations limit the inherent authority of the agencies to remedy unlawful discrimination (i) to administrative proceedings under 5 C.F.R. §713, (ii) to the specific remedies and circumstances set out in 5 C.F.R. §713, or (iii) in any other way (specify).

16. The government's brief describes a number of deadlines which must be met by the complainant and the respondent agency. If the complainant fails to act within the deadline, under what circumstances can or must the relief sought be denied for that reason? On how many occasions has this occurred? If the agency fails to act within the deadline, under what circumstances can or must the relief sought be granted for that reason? On how many occasions has this occurred?

17. The government's brief states that the complaints examiner transmits his findings and recommendations to the agency head for a final decision. Pp. 39-40. Please state whether the complainant is provided with a copy of these recommendations and afforded an opportunity to comment thereon to the agency head before the latter makes his decision.

18. The government's brief states that the investigation may require the giving of sworn testimony. P. 38. Please state the number and percentage of investigations in which this took the form of (a) oral answers to oral questions in a sworn and transcribed proceeding, (b) execution of an affidavit prepared solely by the affiant, (c) execution of an

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affidavit prepared by the investigator in consultation with the affiant, (d) other (explain). Please state the number and percentage of investigations in which the complainant or his representative was permitted to and did ask questions as part of this "sworn testimony."

19. The government states that the Board reviews "The complaint file and all relevant written representations made to it." P. 40; See also P. 51 n. 32. Please state (a) the total combined length of all complaint and similar files of all cases considered by the Board in the last complete year, and (b) the number and percentage of cases in which written representations were made to the Board by (i) the complainant and (ii) the agency or its officials.

20. With regard to the government's description of the informal counseling process and the resulting corrective action, we would like to examine the report filed by the E.E.O. counsellor with regard to the counseling provided to Mr. Brown in the fall of 1970 regarding his rejection for promotion. See Brief for Petitioner, p. 5.

21. The government's brief states, p. 42, that in the event of undue delay the Commission "may" take certain action under 5 C.F.R. §713.220(c). Please state the number of instances in which the Commission (a) required an agency to take special measures to insure prompt processing, and describe the measures required (b) assumed responsibility for processing the complaint, or (c) supplied an investigator and required an agency to reimburse the Commission.

22. The government's brief, p. 55, states that the version of 5 C.F.R. §713.220(a) in effect in 1971, provided that in the event of undue delay the Commission "may" take cer-

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tain action. Please state, for the last full year in which this provision was in effect, the number of instances in which the Commission (a) required the agency to take special measures to insure prompt processing of the complaint and describe the measures, (b) accepted an appeal pursuant to §713.220(a) under §713.234.

23. The government's brief, at pp. 57 and 53a, states that, in the last three fiscal years the Board remanded a significant number of cases (111 in 1975) and reversed a number of others on technical grounds without reaching the merits (58 in 1975). We would like information as to the outcome of these sorts of cases in subsequent agency proceedings. Please state, for the cases heard in the most recent fiscal year as to which subsequent agency proceedings are now reasonably complete, (a) the number of cases in which discrimination was found, (b) the number of cases in which back pay was awarded, and (c) the number of cases in which retroactive promotions were awarded.

Yours sincerely,

/s/ ERIC SCHNAPPER
ERIC SCHNAPPER
Counsel for Petitioner

ES:aa

Appendix F

[SEAL]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

February 13, 1976

Eric Schnapper, Esquire
10 Columbus Circle
New York, New York 10019

Re: Brown v. General Services Administration
(No. 74-768)

Dear Mr. Schnapper:

Your letter dated November 26, 1975, requests information concerning certain statements contained in our brief for the respondents in this case. The statements to which your letter refers include some that reflect statistical information furnished to us by the Civil Service Commission and some that describe the Commission's published regulations governing the administrative process for adjudicating equal employment opportunity complaints by federal employees. We address each of your questions below.

Question 1. The brief for the petitioner in this case, in arguing that a federal employee's resort to the Civil Service Commission's administrative complaint procedure is futile, made reference (pp. 52-53) to certain statistics contained in the report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort —1974*, purportedly showing that only a few complainants are awarded retroactive relief in the administrative process. Our brief noted that the same report contained other statistics showing that "35 to 45 percent of the informal

complaints are followed by some form of corrective action, including promotion, reinstatement, reassignment, and reduction of rescission of adverse action" (Br. 49). As indicated in our brief, this information appears at page 67 and note 221 of the Civil Rights Commission's report. The total number of complaints on which the percentage are based is apparently set forth in the table on page 67 under the column headed "Number of Persons Counseled."

The Civil Service Commission has advised us that it does not have compiled data reflecting the number of instances in which the various types of corrective action referred to in your question were taken. Even a review of the hundreds of individual agency monthly reports on discrimination complaint processing would not permit an accurate answer to your inquiry, in part because the monthly reports are made in categories different from those that your letter uses (see FPM Letter No. 713-19, Attachment 2), and in part because it now appears that the various agencies have followed differing standards in computing and categorizing corrective actions.

Questions 2 through 6. Each of these questions relates to statistical information contained in footnote 28, pages 48-49, of our brief. We have endeavored to obtain for you the additional data that you request. The General Counsel of the Civil Service Commission has advised us, however, that the Commission's Office of Federal Equal Employment Opportunity does not have reliable data from which to answer your questions. Because the various reporting agencies have apparently been following differing standards in computing and categorizing corrective actions, the accuracy of the Commission's data cannot be assured. We have accordingly concluded that the entire footnote in our brief should be withdrawn. We enclose a

copy of a letter to the Clerk of the Supreme Court requesting that the Court be asked to disregard footnote 28.

Question 7. The statement in our brief to which your question relates merely refers to the data that appears in the Civil Rights Commission's report at page 79. The Civil Service Commission does not have compiled data reflecting the number of cases in which the various types of corrective action were taken.

Questions 8 through 22 (with the exception of 20). These questions relate not to any statistical information contained in our brief but rather to the Civil Service Commission's published regulations, which we summarized in our brief. Your inquiries either are in the nature of pretrial discovery requests or call for legal conclusions or interpretations. It would be inappropriate, in our view, for us to attempt to respond to them at the present stage of this litigation.

Question 20. You may arrange to examine the counselor's report by contacting Robert Rice, Assistant General Counsel for Claims and Litigation, General Services Administration, Room 4101, 18th and F Streets, N.W., Washington, D.C. 20405.

Question 23. The Civil Service Commission has advised us that it does not have data reflecting the subsequent administrative disposition of cases reversed or remanded by the Appeals Review Board.

Sincerely,

ROBERT H. BORK
by LYW
Robert H. Bork
Solicitor General

Encl.